

The European Court of Human Rights Decision on there 'Burqa Ban' and the critical analysis of the Pragmatic experimental logic*

A decisão da Corte Europeia de Direitos Humanos sobre a proibição da burca e a análise crítica da lógica experimental do Pragmatismo

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Abstract

This paper develops a pragmatic analysis of the decision of the European Court of Human Rights, ruling upholding the French ban on the wearing in public of any piece of clothing designed to fully conceal the face (case *S.A.S. v France*, 2014). For this purpose, the pragmatic method of the founder of the Pragmatism C. S. Peirce is initially used to criticize the deductive logic argument developed by the majority of the Court (15 votes), based on the abstract principle of “living together” as an element of the protection of the rights and freedom of others. Then, the Pragmatic abduction reasoning of Peirce, the Logic of Consequences of Holmes Jr and Dewey’s experimental logic were used to revise the arguments of the two dissident judges’ on the case, in order to highlight the conceivable effects of the decision. In correlation, Dewey’s political philosophy is recovered to inquire the fallacies of the majority Court arguments based on ‘stimulating social interactions’ in a democratic society. Interaction together with the principle of continuity represent one of the milestones of the pragmatic philosophy of Dewey. Both are social and political tools indispensable to exam the conditions of possibility of preserving the values of an open and democratic society. In this sense, the Dewey’s concepts of continuity and interaction help to understand what should be the pragmatic meaning of “living together in a democratic society” in opposition to the Court majority decision that did not face the religious and cultural dimensions related to the problem.

Keywords: European Court. Experimental Logic. Human Rights. Philosophical Pragmatism. Legal Pragmatism.

Resumo

Este artigo desenvolve uma análise pragmática da decisão do Tribunal Europeu dos Direitos Humanos, que decidiu manter a proibição francesa do uso em público de qualquer peça do vestuário concebida para cobrir totalmente o rosto (processo *S.A.S. v França*, 2014). Para este propósito, o método

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pragmático do fundador do Pragmatismo C S Peirce é inicialmente usado para criticar o argumento da lógica dedutiva elaborada pela maioria da Corte (15 votos), baseado no princípio abstrato de “viver junto” como um elemento de proteção de direitos e da liberdade de outros. Então, o raciocínio pragmático da abdução de Peirce, a lógica das consequências de Holmes Jr e a lógica experimental de Dewey foram usados para revisar os argumentos dos dois juízes dissidentes sobre o caso, a fim de destacar os efeitos concebíveis da decisão. Em correlação, a filosofia política de Dewey é recuperada para investigar as falácias da maioria dos argumentos da Corte embasados em “estimular interações sociais” em uma sociedade democrática. A interação junto com o princípio da continuidade representam um dos marcos da filosofia pragmática de Dewey. Ambas são ferramentas sociais e políticas indispensáveis para examinar as condições de possibilidade de preservar os valores de uma sociedade aberta e democrática. Nesse sentido, os conceitos de continuidade e interação de Dewey ajudam a entender qual deve ser o significado pragmático de “conviver em uma sociedade democrática”, em oposição à decisão da maioria da Corte que não enfrentou as dimensões religiosas e culturais relacionadas ao problema.

Palavras-chaves: Corte Europeia. Lógica experimental. Direitos Humanos. Pragmatismo Filosófico. Pragmatismo Jurídico.

1 Introduction

The Logic of Pragmatism will be taken as the methodological instrument to interpret the decision of the European Court of Human Rights in its ruling upholding the French ban on the wearing in public of any piece of clothing designed to fully conceal the face (case of *S.A.S. v. France*, judgment delivered on 1 July 2014). Then, methodologically, the philosophical pragmatic approach of C. S. Peirce, J. Dewey and the legal conceptions of O. W. Holmes Jr. will be used to explore logical reasoning and the social and political consequences of the Court's legal adjudication.

The European Court considered that the French Law does not violate articles 8 and 9 of the European Convention of Human Rights respectively: the right to respect for private and family life and freedom of thought, conscience and religion. The majority of Court (15

votes) found that “the ban imposed by the law of 11 October can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of “living together” as an element of the “protection of the rights and freedoms of others”.

On the other hand, the dissent judges (2 votes) argument that the decision “sacrifices individual rights far-reaching prohibition and touching upon the right to one's own cultural and religious identity”. So, for them, the recurring motives for not tolerating the full-face veil are based on interpretations of its symbolic meanings.

The argumentative strategy chosen by the majority of Court in order to justify its decision was a somehow surprising one, and consisted substantially, on the one hand, in subtly dodging the more crucial claims (made by the French and the Belgian Governments and objected by the claimant and the third parties) that the wearing of the burqa or the niqab in public was contrary to the “legitimate aims” of public safety, gender equality and human dignity, and, on the other hand, in acknowledging the existence of the fundamental “right to live in a space of socialisation which makes living together easier”, as derived from the legitimate aim of the “protection of the rights and freedoms of others”.

Behind of the apparent scene of the liberal and democratic decision of the European Court in dealing with the relationships between the European tradition of Human Rights and the Islamic culture, characterized by strong religious compromise, emerges the major problems of the mentioned decision of the Court. It represents a sample of the still existing prejudices between these different cultural environments. On the other hand, the logic of legal reasoning based upon a methodology of Positivist deductive syllogism (Logic of Antecedents) has acted as barriers to a more flexible interpretation of problems of such a nature. The deductive logic of the legal decision exposition is different from the experimental logic of Pragmatism (Logic of Consequences). To better understand this problem it seems relevant to appeal to the logic of abduction as a therapy to clarify these conflicts through the Logic of Consequences. The form of the abductive reasoning was given by the following Peirce's expression: “The surprising fact, C, is observed; but if A were true, C would be a matter of course, Hence, there is reason to suspect that A is true”¹.

¹ PEIRCE, Charles S. *Pragmatism and abduction*. Editor Artur Burks. Cambridge: Harvard University Press, 1934. p.117. (Collected Pa-

So, Peirce pointed out that the rule for attaining the third grade of clearness is to take into consideration the conceivable effects that have practical bearings². (How to Make our Ideas Clear)

Dewey represents the pragmatic philosopher who methodologically interpreted the interactions between the individual and his community, and how these interactions could be channelized towards the construction of a genuine democratic society. It is relevant to observe how the decision of the European Court – object of this study – emphasized, as fundamental to its interpretation, the notion of socializing spaces as a possibility towards a more functional and peaceful social interaction. O. W. Holmes Jr. brings to the problem the legal pragmatic contribution through his aphorism, according to which the life of Law has not been logic but experience³. In this case, Holmes' ideas seem to put into question the Logic of Antecedents inherent to the decision of the European Court. Moreover, from a pragmatic point of view, it is necessary to examine whether the wearing of the burqa or niqab in public can cause the so-called “clear and imminent hazard” that serves as limit the freedom of speech and expression of thought. It is, therefore, a decision which being pure formalist, becomes a fertile ground for pragmatic critical analysis.

In summary, the aim of this paper consists in articulating the logical of scientific inquiry developed by Peirce and the social and political concerns raised through the idea of democracy as a milestone of Dewey's Pragmatic Philosophy with the Logic of Consequences brought about by the legal realism of O.W. Holmes Jr. The aim, then, is to critically analyze the decision of the European Court of Human Rights opening other possible alternatives to reconcile individual freedom and social interests.

2 The Pragmatic Doubt against the Belief on the Deductive Logic Argument on Court Adjudication

Peirce's Pragmatism referred to some traditional methodological approaches, which have been used to access truth: method of tenacity, method of authority and the *a priori* method for the fixation of belief. By criticizing those traditional methods, Peirce proposed his original scientific pragmatic method, called Logic of Abduction, as a path to bring about believes through conceivable effects. Holmes, also criticized the postulates of syllogistic deductive logic, followed the same steps of Peirce, applying the Logic of Consequences turned toward the analysis of legal problems.

The legal justification of the decision taken by the European Court did not reveal the practice of reasoning, which occurs in the so called Context of Discovery (Inquiry). This legal decision was strategically justified by a deductive logic, which neutralize the values, disputes and prejudices that involves the European tradition of Human Rights and the Islamic culture, and so, blinded to a more open-mind reasoning.

The Court decided that the French Law of “burqa ban” does not violate the European Convention of Human Rights, because this Law ensures the conditions conducive to “living together” or “respect for the minimum requirements of life in society”, deductively inferred from the article 8 and 9 of the Convention.

Analyzing the legal decision, the major Premise of the legal reasoning were the Articles 8 (Right to respect for private and family life) and 9 (Freedom of thought, conscience and religion) of the European Convention of Human Rights. The Minor Premise involves the argument that the French prohibition of wearing face coverings in public spaces ensures the conditions of “living together” or “respect for the minimum requirements of life in society”, prescribed by Law in European Convention of Human Rights. The Conclusion was that the French Law of “burqa ban” does not violate the European Convention of Human Rights. The deduction model (major premise + minor premise = conclusion) used in the legal reasoning of the majority excluded the substantial part of judicial decision-making process, which is the context of discovery – ‘how’ the decision is taken.

pers, v.5)

² PEIRCE, Charles S. How to make our ideas clear. In: *Charles S. Peirce Selected Writings*. Edited by Philip Wiener, Dover Pu. Inc. New York: [S.n], 1958. p.124

³ HOLMES, Oliver W. *The Common Law*. Toronto: University of Toronto Law School, 2011. p. 5.

In opposition to the mentioned majority, two Judges (Nussberger and Jäderblom) voted against it, with the following arguments⁴:

[...] Nevertheless, we cannot share the opinion of the majority as, in our view, it sacrifices concrete individual rights guaranteed by the Convention to **abstract principles**. It is **doubtful** that the blanket ban on wearing a full-face veil in public pursues a legitimate aim (B). In any event, such a far-reaching prohibition, touching upon the right to one's own cultural and religious identity, is not necessary in a **democratic society** (C). Therefore we come to the conclusion that there has been a violation of Articles 8 and 9 of the Convention (D). [...]

Nevertheless, the majority see a legitimate aim in ensuring "living together", through "the observance of the minimum requirements of life in society", which is understood to be one facet of the "rights and freedoms of others" within the meaning of Article 8 § 2 and Article 9 § 2 of the Convention (see paragraphs 140-142). We have strong reservations about this approach [...]

In summary, the contrary conclusion of the dissident judges goes in the following direction⁵:

[...] 25. In view of this reasoning we find that the criminalisation of the wearing of a full-face veil is a measure which is disproportionate to the aim of protecting the idea of "living together" – an aim which cannot readily be reconciled with the Convention's restrictive catalogue of grounds for interference with basic human rights.

26. In our view there has therefore been a violation of Articles 8 and 9 of the Convention.

Considering the effects and the consequences of the European Court decision, it is possible to justify the arguments of the dissident judges on the grounds of the Philosophical Pragmatic method of Charles Sanders Peirce and its logical implications. By his turn Holmes, following the same steps of Peirce Pragmatism, developed his Logic of Consequences applied to Law.

The abduction reasoning as a logic of mind is driven by the desire to achieve a theory (hypothesis) to explain the surprising facts. Applying to Law, to find the explanation of a problematic legal fact, a hypothesis is conjectured, from where the conceivable consequences are inferred.

The abduction reasoning would have the following model (conclusion + major premise = minor premise). Then, in abduction, we reason from the effects to cause. Therefore, the conclusion comes first anticipating the consequences, as an insight process where judges' personality and individual bias take place. Therefore, the minor premise that appears in the legal inference is born hypothetically and submitted to inquire. If we consider that anticipating the conclusion is the way the judge mind works, the minor premise appears as problematic, hypothetical and fallible.

The legal pragmatic premise of O. W. Holmes Jr., according to which the judge cannot solve particular cases from a general principle, clarifies the bridge between the philosophical logic of pragmatism and its application to law. As Holmes had pointed out many times, a dissent opinion on judgment represents an important mechanism to improve the legal debate and to explore aspects of the intrinsic fallibilism of legal reasoning from a pragmatic perspective.

Taking into consideration the contribution of the scientific pragmatic method developed by Peirce, the legal analysis of the case would start with a real doubt and not a complete doubt in Cartesian terms. According to Peirce, "we cannot begin with complete doubt. We must begin with all the prejudices which we actually have when we enter upon the study of philosophy"⁶. Applying this to the European Court of Human Rights decision-making process, the doubt raised by the dissident judges is a pragmatical one, inquiring whether the blanket ban on wearing a full-face veil in public is a legitimate aim of protecting the democratic principle of living together. **The Court prejudices inherited to the decision of the majority are, then, formally neutralized by a (Cartesian) maxim.** So, the process of inquiry did not take place in the judicial justification of the majority. Recovering Peirce words, "Let us not pretend to doubt in philosophy what we do not doubt in our hearts"⁷.

Under a different perspective, Professor Just called attention to the European Court commitment towards a neutralizing justification, as a strategy to surpass the

⁴ Joint partly dissenting opinion of Judges Nussberger and Jäderblom. *In: EUROPEAN COURT OF HUMAN RIGHTS. S.A.S. v. France Judgment*. Strasbourg, jul. 1, 2014. p. 61-67.

⁵ Joint partly dissenting opinion of Judges Nussberger and Jäderblom. *In: EUROPEAN COURT OF HUMAN RIGHTS. S.A.S. v. France Judgment*. Strasbourg, jul. 1, 2014. p. 66-67.

⁶ PEIRCE, Charles S. *Some consequences of four incapacities*. Cambridge: Harvard University Press, 1934. (Collected Papers, v.5). p. 156.

⁷ PEIRCE, Charles S. *Some consequences of four incapacities*. Cambridge: Harvard University Press, 1934. (Collected Papers, v.5). p.157

costs of a potentially explosive decision. According to him, the Court validated the French law on blanket ban “without a single condemnatory word towards Islam”⁸.

Formally, the majority of the Court did not face the main problem related to freedom of religion, opting to decide based on a pre-existing normative, general democratic accepted criteria (principle of living together), as a maxim to curb questions regarding Court’s political, ideological or philosophical preferences. Focusing only in the context of justification, the highly controversial nature of the French law was easily overcome by abstract assumptions.

The Pragmatic proposal allows one to explore the context of discovery and inquiry as part of legal methodology, in order to improve the decision-making process, traditionally based exclusively on the context of justification, expressed by a deductive logic. Although the method of tenacity, a priori and authority have their merits, they limit the legal reasoning to the context of justification (costless and comfortable), blocking, in Peirce’s view, the investigation of the practical conceivable effects of the Court decision.

The abduction of Peirce is profoundly tied with the concept of the Logic of Consequences theorized by Dewey in his paper “Logical Method and Law”, on 1924. Dewey uses the concept of Logic of Consequences in opposition to what he named of Logic of Antecedents of legal reasoning, based on deduction. According to Dewey deduction inference does not serve to decide, but only to justify what has been previously decided by the judge. As the logic of fixed forms, deduction does not involve a method able to reach intelligent decisions in concrete situations, not even a method able to adjust legal disputes regarding rights protections and public interest issues. The Logic of Antecedents (deductive reasoning) used by the majority of the Court has acted as barriers to a more flexible interpretation of cultural and religious problems.

Peirce’s abduction in Science would have the same properties of Dewey’s proposal to Law: the idea under which the judicial decision-making process operates through the logic of investigation (abduction), where the judge decides based on the conceivable consequences

of the legal decision, adopting a logic relative to consequences rather than to premises. It involves a predictable, probable and future-oriented way of thinking. In summary, one can observe that the European Court decided deductively, without considering Peirce’s adviser, namely “consider what effects, which might conceivably have practical bearings, we conceive the object of our conception to have”⁹.

3 The grounds of the Philosophical Pragmatism and the fallacies related to the Court’s argument on “stimulation social interactions” in an open democratic society.

Pragmatism is a pluralistic philosophy. The history of pragmatism has demonstrated that one cannot find a single pragmatic interpretation about a great majority of its topics, including pragmatism itself. However, there is a conducting wire that seems to find a common point of convergence among the pragmatic thinkers - as one soon will see - mainly among those who integrated the Metaphysical Club: the scientific procedures to approach a problem. For the sake of clarity I have chosen one thinker that I do believe be the most adequate to the purposes of the present analysis, without losing sight of how his methodology shares intercourse with his fellows.

Rigorously, we are not convinced that the human nature can sustained unchangeable beliefs, even when they are strictly conducted by reasons extracted from rules of scientific logic; much less this seems to be possible on the field of social and moral problems, field in which judicial decisions are inserted.

Karl Popper said that the pillars which give support to scientific knowledge were not sink in a firm and solid ground, rather in a swamp one. In this connection, as Charles Sanders Peirce had pointed out - imagination, creativity, art, in short, could have threshold elements to help the logic of scientific discover make our ideas more clear, even without being properly true ideas. In his own words:¹⁰

⁸ JUST, Gustavo. Interpretative choices and objectivity-oriented legal discourse: a strategic analysis of the ECtHR Ruling on the French Face Veil Ban. *Int J Semiot Law*, 2015. p. 15. DOI 10.1007/s11196-015-9443-8

⁹ PEIRCE, S Charles. How to Make our Ideas Clear. In: *Charles S. Peirce selected writings*. Edited by Philip Wiener, Dover Pu. Inc. New York: [s.n], 1958. p.124

¹⁰ PEIRCE, S Charles, How to Make our Ideas Clear. In: *Charles S. Peirce selected writings*. Edited by Philip Wiener, Dover Pu. Inc. New

[...]How to give birth to those vital and procreative ideas which multiply into a thousand forms and diffuse themselves everywhere, advancing a civilization and making the dignity of man, is an art not yet reduced to rules, but of the secret of which the history of science affords some hints.[...]

Specifically, it is taken for granted that, a rule of law, only analytically organized, couldn't anticipate the practical effects and consequences of what will effectively happen in the future course of experience; so, on these grounds, a pragmatic appraisal of the Court's decision would, in a first glance, leads to the conclusion that the Burqa ban Law, fails in maintaining – as it aims – **public safety, the stimulation social interactions, preserving the continuity of the indispensable values of an open and democratic society.**

However, it seems prudent for a while, put these suppositions within brackets, in order to deep the inquiry – under a pragmatic point of view - in order to verify in what extent, if any, the Court took into consideration the need of analyze and experimentally evaluate the alleged practical effects and possible consequences of such a decision. In order to do this is important to first verify, what interaction means, considering the emphatic tone the expression **“stimulating social interactions”** assumes in the Court's argumentation and which are its prerequisites. Interaction together with the principle of continuity represent one of the milestones of the pragmatic philosophy of John Dewey. Both are, social and political tools indispensable to exam the conditions of possibility of preserving the values of an open and democratic society. They are the headlights which illuminate and select among experiences the ones which promote socially and morally growth, from those that do not. Once one is navigating on the waters of law, it is important to observe how these principles work in connection with legal problems.

Oliver Wendell Holmes Jr. in his known statement “Common Law” vehemently refuted the legal formalism and its obstinate tendency to transform law into a oracle, endowed with the power of anticipating future consequences¹¹:

[...]It cannot be helped, it is as it should be, that the law is behind the times. As law embodies beliefs that have translated themselves into action, while there still is doubt, while opposite convictions still keep

a battle front against each other, the time for law has not come; the notion destined to prevail is not yet entitled to the field. It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seems to him to be first principles are believed by half fellow men to be wrong.[...]

Holmes is the most important pragmatic thinker in the field of law. More than that, he is a social scientist who used law as a tool to understand the complex problems of social conflict. As an empiricist, he saw law not as something abstract but as an instrument of solving conflicts. When he affirmed that “the nature of law is not logic but experience” he wanted to convey the idea that experience is plural and so, very far from logos, being law the witness and external deposit of our moral life which follows the values of society and not dictate them. Here, Holmes adhere to Dewey's advise of avoiding the use of law as a separate entity.

The interpretations based on objective logical reasoning have been largely accepted as a secure alternative to reach unquestionable truths. However, the price of this apparent formality is an inevitable separation between law and moral. Its philosophical foundations retroacts to the so-called Legal Positivism, whose historical roots are first found in Hobbes and his difficulties to deal with moral consequences of individual feelings of superiority against others on the natural state. Together with Austin's interest in implementing Bentham analytical instrumentalism as an achievement of a logical and universal codification, both - as Professor Kellogg¹² had suggested – offered fertile seasons to the growth of Legal Positivism, later, carried forward in the twenty century by the British philosopher of law H.L.A. Hart. Although one can observe some improvements in the Hart's formal positivistic conception of law, he still interpreted norms as logical and hypothetical commands, apart from their axiological dimensions which safeguard the free and practical exercise of social behaviors.

Opposed to Hobbes assumptions that a sovereign should impose rules to provide security and social welfare, Holmes suggests a decentralized and flexible order susceptible of constant reshapes and revisions. In this connection, Holmes methodology is more akin with Peirce's and Dewey's communal inquiry than with the Aristotelian formal logic.

York: [s.n], 1958. p. 136.

¹¹ HOLMES JR, Oliver W. *The common law*. Toronto: University of Toronto Law School, 2011. p. 168

¹² KELLOGG, Frederic R. *Oliver Wendell Holmes, Jr., legal theory, and judicial restraint*. Cambridge: University Press, 2007. p. 66

In accordance with the pragmatic approach, future effects and consequences of behaviors, require a hypothetical experimental evaluation of their future course, without no previous assurance that it will be or not accepted by the public.

The impossibility of, under positivist foundations, promoting an organic implementation of legal decisions, leads necessarily to a second option: the mechanic one (Roscoe Pound refers to mechanical jurisprudence). The assumption of such alternative is that freedom is mix up with security and the government, in order to maintain political stability and "social interactions", must take care first of security, in order to control the use of the second freedom.

4 The pragmatic methodology of Dewey's instrumentalism and the heritage of Charles Sanders Peirce

The point of depart of Dewey's political philosophy and his conception of democracy consists on the understanding of how he methodologically formulated a theory of values, able to avoid a bifurcation of reason from experience. Such an isolation – Dewey argued – generates insecurity in relation to man's aims to approach certainties. For him, the path toward the solution of social and politic problems has, as it major challenge, to find out the possibility of better integrate beliefs to the world, within a scientific perspective. Or, in other words, to frame man's firm persuasions of his beliefs, including the religious ones, within the whole human society by using a scientific pattern. This strategy will bring to light the ties which connect the philosophical investigations of Dewey to Peirce's methodological tenets.¹³

One clear sign of Peirce's logic obsession for the study of logic was his statement entitled "Concerning the Author", inserted in 1897 in his "Collected Papers". There, he declared that since the awake of his capacity

of thinking and throughout no less than forty years, he has devoted his entire life: "diligently and incessantly occupied with the study of method (of) inquiry, both those which have been and are pursued and those which ought to be pursued."¹⁴

Looking for an expression which could best sum up the meaning of his epistemological findings during those years he spent in the course of this ripening process, he finally decided to designate it as "*fallibilism*". Peirce's conception of fallibilism presupposes that any statement or belief is potentially contaminated by a virus of error, except in relation to the concept of fallibilism itself. Therefore, apart from this exception, all concepts, no matter their origin, are, by nature, unwarranted, and so, continually susceptible to be revised.

Besides, Peirce's conception is fundamentally connected with another important landmark of the pragmatic theory of experience: the mentioned principle of continuity. Peirce¹⁵ considered the principle of continuity as the tool which gives objectification and functionality to fallibilism, once for him:

[...]fallibilism is the doctrine that our knowledge is never absolute but always swims, as it were, in a continuum of uncertainty and of indeterminacy. Now the doctrine of continuity is that all things so swim in continua [...]

It is still important to explore another facet of Peirce's scientific knowledge, swinging around his cultural and intellectual knowledge. It is concerned with his long run intellectual career and ability of reconciling, in a rich and rare combination, a great proficiency as a natural scientist, together with continuous and systematic studies on the field of the history of philosophy, which permit him, simultaneously, as Buchler¹⁶ pointed out:

[...]critically utilize his historical study toward the achievement of a imaginative depth and his experimental science toward the development of powerful logic. The striking originality of his thought thus grows from a broad and solid foundation, and it is the product not only of his native intellectual genius but of his moral conviction that philosophy must build as well as repair.

The application of the principle of continuity as a

¹³ Peirce was widely considered by his fellows as the father of Pragmatism, notwithstanding, he himself had recognized Nicholas Saint John Green - a skillful and learned lawyer - as the man who, in applying Alexander Bain's definition of belief, namely, "that upon which man is prepared to act" became the forerunner of Pragmatism. Green, according to Peirce, was responsible for elevating Pragmatism beyond the landing of a mere corollary. Ironically, Peirce replies his above epithet suggesting that: "I am disposed to think of him (Green) as the grandfather of pragmatism".

¹⁴ PHILOSOPHICAL writings of Peirce: selected and edited by Justus Buchler. New York: Dover Publications, 1955. p.1

¹⁵ PEIRCE, Charles S. Synechism, fallibilism, and evolution. In: *Philosophical writings of Peirce*. Edited by Justus Buchler. New York: Dover Publication, 1955. p.356.

¹⁶ BUCHLER, Justus. Introduction. In: *Philosophical writings of Peirce*. New York, Dover Publication, 1955. p. 9

fundamental category of Dewey's philosophical instrumentalism is considerably owed, to Peirce's methodological overture which motivated Dewey¹⁷ to use it as a lever for investigating changes in nature, being it physical, social or moral.

However, it is important as well to insert here a parenthesis, in order to point out that, apart from Peirce's influence, the idea of continuity in Dewey's thought, retroacted to his early graduate studies, through the influence of Hegel's philosophy, which, according to him, first and definitely sediment his conception of continuity as an existential trait of nature and the motor of inquiring.

In an article entitled "From Absolutism to Experimentalism" of 1930, Dewey¹⁸ declared that apart from his later drifts from Hegelian idealism he never ignored and much less denying what an astute critic had affirmed about Hegel's influence on his philosophical conceptions, namely that: "Hegel has left a permanent deposit in my thinking"¹⁹, and concluded, "I still should believe that there is greater richness and greater variety of insights in Hegel than in other single systematic philosopher"²⁰. Then, it seems appropriate to state that in this context continuity, in Dewey's realistic and naturalistic philosophy, is a category which partially criticizes and gives support to his original idealistic tenets.

5 Peirce and Dewey's falibilism under a comparative view

If the pragmatists in general, mainly the fellows of the Boston's Metaphysical Club, tried to settled their methodological investigations, taking Peirce's logic postulates as a point of depart of their philosophical analysis - Dewey, in spite of the alleged idealistic residues left

in his mind by the Hegelian conceptions - was not an exception.

To illustrate how some of these ties were sized, one could invoke Peirce's major concern with a paramount logical canon, which he explained in one of his most famous papers: "How to Make our Ideas Clear". There, he pointed out the principles he considered fundamental to push thought to a higher grade of clearness which goes beyond the canons of the traditional logic. For him, thought, in a scientific perspective, has as a sole function to produce beliefs; what goes beyond this, he asserted, belongs to other systems of relations.

If then, the role of thought is generates beliefs, consequently, it has as its leitmotif the attainment of thought at rest; and whatever does not refer to belief is no part of the thought. So, in searching for answering what a belief really is, Peirce²¹ defined it as follows:

[...]It is the demi-cadence which closes a musical phrase in the symphony of our intellectual life. We have seen that it has just three properties: First, it is something that we are aware of; second, it appeases the irritation of doubt; and third, it involves the establishment in our nature of a rule of action, or, say in short, a *habit*. As it appeases the irritation of doubt, which is the motive for thinking, thought relaxes and comes to rest for a moment when belief is reached. But since belief is a rule for action, the application of which involves further doubt and further thought, at the same time that it is a stopping-place, it is also a new starting-place for thought. That is why I have permitted myself to call it thought at rest, although thought is essentially an action.[...]

Dewey's conception of thought as an instrument for reconstructing human experiences analogically pushes knowledge, in order to reconcile it with Peirce's premise that the function of thought is to pursue beliefs; as Peirce, Dewey considered thought a restless instrument to deal with an universe full of uncertainties, risks, challenges in which human intelligence has constantly and interminably to deal with for surpassing its conflicts and try to change human habits accordingly; in a continue search for settling problematic situations man aims to transform them into renewed and more enduring and richer experiences.

However, if one looks now for some distinctions between Peirce and Dewey, it would be appropriate to

¹⁷ DEWEY, John. *The quest for certainty*. New York: Gifford Lectures, 1929. p. 18

¹⁸ DEWEY, John. From absolutism to experimentalism. In: *The later works*. Edited by Jo Ann Boydston. Illinois: Southern Illinois University, 1984. p.147-160. (v.5, 1929-1930)

¹⁹ DEWEY, John. From absolutism to experimentalism *apud* RUSSEL, Bertrand. Dewey's New Logic. In: *The library of living philosophers: the philosophy of John Dewey*. Editor Paul A. Schilpp. Illinois: Illinois University, 1971. p. 138.

²⁰ DEWEY, John. From absolutism to experimentalism. In: *The later works*. Edited by Jo Ann Boydston. Illinois: Southern Illinois University, 1984. p. 154. (v.5, 1929-1930)

²¹ PEIRCE, Charles S. How to Make our Ideas Clear. In: *Selected writings: values in an universe of Chance*. Edited by Philip P. Wiener. New York: Dover Publication, 1958. p.28-9

call attention that, even though Dewey essentially had used Peirce's conception of thought as a tool for action, there is a subtle difference in the direction they methodologically used it. So, while Peirce, as a natural scientist, was mainly devoted to explain the relevance of the methodological procedures to the scientific inquiry in general, Dewey, as a cultural philosopher, was occupied and preoccupied with emphatically use Peirce's pragmatic logic directing it to moral and political problems, as well as with the role of democracy in their social arrangements.

However, this does not mean that Peirce was completely immune to the role of his logic and its possible application to the sphere of moral problems. He also believed that man, is naturally inclined to seek for ideals, whose aims are to make steady his own beliefs; however— he advised — it is very important that he must be aware about the steps he follows to make such choices, transforming them in beliefs whose consequences and effects could be empirically tested. Because, if he takes his ideals strictly as a categorical, fixed and unchanging expression of a necessary moral development he will slide down on a pitfall which makes him divert, or blocking the way to perceive the logical consequences of his inquiry. For this reason, to access knowledge adequately requires a kind of Socratic and modest attitude which leads man to renounce the sin of yielding fancies to arrive to truly convictions. So, when he stoically accepts his own limitations before a world plenty of uncertainties he realizes that “fallibilism” is a pre-condition of pragmatic inquiry which requires a kind of altruistic logic begging for a servitude of thought, in front of a world of chances. Allegorically, would be possible to accept Peirce's advise as the real available possibility of man to free himself from the fetters of alleged dogmatic truths.

Connected with these moral beliefs concerns, it is seasonable to bring into consideration a reference Peirce made to moral beliefs as related to religious convictions. Here, he stretched the boundaries of his fallibilistic conceptions out to religious problems.

Peirce argued that Protestants considered flesh and blood as elements of the sacrament only in a figurative sense, while the Catholics literally accept them just as they were meat and blood, notwithstanding they also admit their additional sensible qualities. But, Peirce said, “It is foolish for Catholic and Protestants to fancy

themselves in disagreement about the elements of the sacrament, if they agree in regard to all their sensible effects, here or hereafter.”²²

This argument demonstrates that, whatever concept we have in our minds of an object, it will correspond to its sensible effects; so, it is a mere caprice, a whim, to admit any other possibility, except if we deceive mentally mix up a fancy's thought as a part of the thought itself. It is just on the basis of such an argumentation that Peirce arrived to his conception of what the concept of an object means (see above section 2).

6 Outlines of the concepts of continuity, interaction and fallibilism in the social philosophy of John Dewey

Regarding Peirce's fallibilism and its methodological applications, some considerations related to Dewey's use of the principle of continuity sized up to his concept of a social experience to select intelligently their qualitative effects, deserve additional remarks.

In an article entitled “‘Experience, Knowledge and Value” Dewey²³ started searching for definitions of “truth” related to, inquiry, continuity and the defeat of man's beliefs in unchangeable truths. He affirmed :

[...]The ‘truth’ of any present proposition, is, by definition, subject of the outcome of continued inquiries; its ‘truth’, if the word must be used, is provisional; as near the truth as inquiry has as yet come, a matter determined not by a guess at some future belief but by the care and pains with which inquiry has been conducted up to present time. Admission of the necessary subjection of every present proposition to the result to be obtained in future inquiry is the meaning of Peirce's reference to confession of inaccuracy and one-sidedness as an ingredient of the truth of a present proposition.[...]

In a footnote to the above quotation Dewey reinforced his allegiance to Peirce's principle of fallibilism and his emphasis upon its inherent notion of probability which affects all kinds of experience.

²² PEIRCE, Charles S. How to Make our Ideas Clear. In: *Selected writings: values in an universe of Chance*. Edited by Philip P. Wiener. New York: Dover Publication, 1958. p.124.

²³ DEWEY, John. Experience, knowledge and values. In: *The life of the living philosophers: the Philosophy of John Dewey*. Edited by Paul A. Schilpp. Illinois: Open Court Pu, 1971. p.573. v.1

Experiences, he thought, may stir up curiosity, wishful thinking, intentions which may drive a person for future projects as an attempt to materialize his hopes. However, each experience being a moving force, its value will depend on the direction it is settled in motion. Therefore, both philosophically and pedagogically, to deal intelligently with experiences –presuppose a careful evaluation of the directions the experiences would take. A no less important requisite to deal with them is that they do not occur only within a person. It is important to acknowledge that all human experiences are shared ones, in other words, they are, by nature, social.

The social character of experience is a kind of moral experience, an attitude of discernment, let's one say, form of practical wisdom overt to a critical examination. Its function is, then, to select attitudes akin with a lived and moral continuation of the individual and social growth, apart from those which go in reverse direction.

So, experience comprises two different, even though inseparable dimensions: objective experiences and subjective ones. They are not separated, much less opposed. But they require a certain equilibrium in such way that, neither internal dispositions (individual impulses) should prevail over the social objectives and environmental conditions, nor the latter must imperialistically impose its external strength to the former.

Again, the instrumental pragmatic logic of Dewey interprets knowing as a form of doing, so that the objects of knowledge are consequences of operations performed by man, and not a pure consequence of an illuminated reason, bestowed with self-sufficiency.

Being knowledge operational in Dewey's instrumentalism, it is directly connected with the logic of the scientific investigation. Its function then is instrumental in the sense it provides a balance, a kind of middle term between subjective and objective conditions of knowledge, between knowing and the known. This dimension of social knowledge, requires communication, which corresponds to the second fundamental principle of Dewey's interpretation of experience, namely: **the principle of interaction**.

Therefore, both continuity and interaction act as twins, born of the same birth sharing the pragmatic formulation of the human knowledge. According to him²⁴:

²⁴ DEWEY, John. *Experience and Education*. New York: Kappa Delta Pi, 1938. p. 44-5

[...]The two principles of continuity and interaction are not separate from each other. They intercept and unite. They are, so to speak, the longitudinal and lateral aspects of experience. Different situations succeed one another. But because of the principle of continuity something is carried over from the earlier to the later ones. As an individual passes from one situation to another, his world, his environment, expands and contracts. He does not find himself living in another world but in a different part or aspect of the same world. What he has learned in the way of knowledge and skill in one situation becomes an instrument of understanding and dealing effectively with the situations which follow. The process goes on as long as life and learning continue.[...]

Dewey explored epistemologically the connections between the scientific knowledge and social politic problems digging their roots in the history of the western culture. He found that since the Greek tradition there was a division between knowledge and belief. Such a division was originally owned to the historical changes from religion to philosophy. Through it, imagination and emotion were treated under the lights of a rational discourse, submitted to the canons of the formal logic. In "The Quest for Certainty" Dewey recognized that believes follow two distinct paths: "He has beliefs about actual existences and the course of the events, and he has beliefs about ends to be striven for, policies to be adopted, goods to be attained and evils to be averted."²⁵

He considered an urgent practical problem to find a possibility of reconciling and connecting these two beliefs: "How shall our most authentic and dependable cognitive beliefs be used to regulate our practical beliefs? How shall the latter serve to organize and integrate our intellectual beliefs?"²⁶

7 Dewey's integrated view of religious and democratic beliefs

Now the philosophy of John Dewey will be drive to religious beliefs as connected with the idea of democracy. Different from his fellow William James, who interpreted religious life on the lens of individual values, Dewey saw it as a moral, social and educational

²⁵ DEWEY, John. *The Quest for Certainty*. New York: Gifford Lectures, 1929. p. 18

²⁶ DEWEY, John. *The Quest for Certainty*. New York: Gifford Lectures, 1929. p. 18

phenomenon. So, they become instruments to develop imaginative relations turned toward man and his social ideals. Dewey's all-around logic, supported by a theory of experience is immersed in the whole cultural environment, searching for a set of ideas, beliefs and intellectual and social, moral and religious attitudes with which individuals could cope with the real world.

How, then, to reconcile the experimentalism and its pragmatic cornerstone: the scientific method, with fields like ethical and religious? This would be possible, if one takes for granted that religious have moral consequences and effects, analogous to any other social behaviors. So, the wire system which moves social experiences, moves as well, the religious ones. Interlaced and embracing all these social, political and moral and religious experiences come forth the idea of democracy.

Dewey's cultural philosophy reputes indispensable that the moving energy which direct all human experiences are irradiated by certain moral binds which, as a cement, which ethically concretizes social interactions. This cement is democracy. Human beings would have no meaning at all, except if it conveys the intimate and vital connection of democracy to man's life. According to him²⁷:

[...]We cannot continue the idea that human nature when left to itself, when freed from external arbitrary restrictions, will tend to the production of democratic institutions that worked successfully. We have now to state the issue from the other side. We have to see that democracy means the belief that humanistic culture should prevail; we should be frank and open in our recognition that the proposition is a moral one –like any idea that concerns what should be.(...) No matter how uniform and constant human nature is in the abstract, the conditions within which and upon which it operates have changed so greatly since political democracy was established among us, that democracy cannot now depend upon or be expressed in political institutions alone. We cannot even be certain that they and their legal accompaniments are actually democratic at the present time – for democracy is expressed in the attitudes of human beings and is measured by consequences produced in their lives.

And in his book *The Public and its Problems*, he proceeded²⁸:

[...]Regarded as an idea, democracy is not an alternative to other principles of associated life. It is the idea of community life itself. It is an ideal in the only intelligible sense of an ideal: namely, the tendency and movement of some thing which exists carried to its final limit, viewed as completed, perfected.[...]

In order to fulfill such a desideratum, *Education* (one of the cornerstones of Dewey's democracy) is the social formula able to adjust a citizen's conduct as a member of a political group to actively participate, as a free and responsible individual, of the family life, industry and commercial activities, scientific, artistic and religious practices.

Dewey's pragmatic naturalist view of religiosity as exposed in "A Common Faith", implies that religious experiences could be analyzed, as any other types of experiences. So, they are analogously susceptible to a pragmatic inquiry, once, religious phenomena exists in us as a fruit of our ideals beliefs. **Therefore, there is no reason to consider them mystical experiences, emanated from a superior divine power, but as another type of natural manifestation of experience.** As he said²⁹:

[...]On the contrary, there is every reason to suppose that, in some degree of intensity, they occur so frequently that they may be regarded as normal manifestations that take place at certain rhythmic points in the movement of experience.

Religious attitudes are, by the same token, committed with the realization of the democracy as a vital moral and spiritual human ideal. If democracy prevails, we no longer are compelled to be reduced to a mechanical model. As he pointed out³⁰:

[...] Whether or no we are, save in some metaphorical sense all brothers, we are at least all in the same boat traversing the same turbulent ocean. The potential religious significance of this fact is infinite.

Another important question now arises: how it is possible interpret the turmoil of modernity through the lights of the dialectical and contradictory conflicts between the development of science and technology, commerce and arts, and the needs of a democratic community? How to deal with this problem beyond national frontiers? which agreements and methods of

²⁷ DEWEY, John. Democracy and human nature. In: *Freedom and culture*. New York: G.P. Putnam's Sons, 1939. p. 124-125

²⁸ DEWEY, John. *The public and its problems*. Chicago: Gateway Books, 1946. p. 148

²⁹ DEWEY, John. *A common faith*. [S.l.]: Yale University Press, 1991. p.37

³⁰ DEWEY, John. *A common faith*. [S.l.]: Yale University Press, 1991. p.55

cooperation and interactions would promote common shares among peoples and nations?

Contrasting with these imperative requirements, one could observe a permanent feeling of hostility and belligerence between nations and cultures. Morally, each state takes for granted its own values and interests, acting as the supreme judge of its own interests. As a matter of fact, politically, it seems that no substantive shift has happened – except for worse – comparing the length of time between Dewey's description of this conflicting *status quo* and the present days. The remedy Dewey³¹ prescribed for those alleged social illness is democracy. And the condition and essence of a democratic government is education:

[...]The devotion of democracy to education is a familiar fact. The superficial explanation is that a government resting upon popular suffrage cannot be successful unless those who elect and who obey their governors are educated. Since a democratic society repudiates the principle of external authority, it must find a substitute in voluntary disposition and interest; these can be created only by education. But there is a deeper explanation. A democracy is more than a form of government; it is primarily a mode of associated living, of conjoint communicated experience.[...]

8 Dewey pragmatic method and law; religious and democratic implications

Dewey was not indifferent to the issue of how methodologically to deal with legal problems. By contrary, in spite of not being a technical lawyer he had exhaustively treated the philosophical issues which lay behind law practices.

To the purpose of the present analysis it was selected one of his sharpest statements in which the logic and methodological implications and applications of Pragmatism could be adjusted to law decisions: "Logical Method and Law". It will be analyzed in confront with the alleged Court decision.

Holmes affirmed that the language of judicial decision is mainly the language of logic, longing for repose and certainty; however, certainty, in general, is an illu-

sion: "The actual life of the law – he said – has not been logic; it has been experience."

Dewey understood correctly Holmes criticisms to this legal conception of logic: one of rigid certainties in which, every demonstrative or strictly logical conclusion subsumes a particular under an appropriate universal. It is a syllogistic logic, opposed to a pragmatic logic of inquiry.

Dewey illustrated analogically how the actual logic reasoning has managed legal problems, using the classical syllogism of the mortality of Socrates, as a necessary deduction of the major premise that all men are mortal. The syllogistic logic -Dewey argued – pretends erroneously to prove that logic is only concerned with the results of **thinking**, but not with its **operations**.

Besides, Holmes statement that: "General propositions do not decide concrete cases.", was endorsed by Dewey on the grounds that: "No concrete proposition, that is to say one with its subject-matter dated in time and placed in space, follows from any general statements nor from any combination of them however 'logical it may be.'"³²

Dewey was entirely convinced that a pragmatic logic of operations applied to all empirical phenomena is primarily connected with intelligent ways of making decisions. Since the territory of law belongs to the realm of experience, so its investigations should be submitted to the same logical rules.

Moving now toward the problem of passing legislation, having as one of its components, religious beliefs in a multicultural perspective - as occur in the present case – requires to examine to what extent, the Burqa band legislation would or not, be compatible with Dewey's philosophic conception of democracy related to law, religious, and social and political behaviors?

From the arguments developed by Dewey, it is possible to infer that in cultural terms, one cannot separate political, social, educational and philosophical problems one from the other. Since Dewey interpret these problems through the light of a multidisciplinary perspective, the principles of continuity and interaction serve as instruments to connect them. The majority decision on the case SAS v. France was fragmented, as Just³³ had

³¹ DEWEY, John. *Democracy and education*. New York: The Free Press, 1966. p.87

³² DEWEY, John. Logical Method and Law. *The philosophical review*, v. 33, n. 3, 1924. p. 566.

³³ JUST, Gustavo. Interpretative choices and objectivity-oriented

pointed out, once religious and cultural dimensions related to the problem were not taken into consideration through a syllogistic reasoning, which was supported by deductive inferences from general assumptions.

9 Conclusive remarks

An interpretation of the cultural background on which Law has been historically understood, interpreted and applied in Europe will be now discussed. The legacy of European culture played an important role in the social, moral intellectual, and political fields, to promote man's freedom, economic progress, philosophical scientific and technological developments, artistic and aesthetic creativity. All these deeds have served as an evidence of the unavailable treasure it bestowed to the whole western civilization. However, on the other hand, and in spite of all these advancements, social and racial prejudices, wars, religious intolerances have intermittently acted as barriers against these great conquests. In analyzing these antagonistic tendencies under a social-psychological perspective, some pragmatic insights would help to understand better the nature of such a conflicting dualism.

The roots of these contradictory behaviors and inconsistencies are mainly illustrated through the European colonization of aboriginal cultures of the New World. The strength of this discriminatory and violent process seems, still today, to weigh in the minds and hearts of people from the old Continent, bringing psychologically and socially to the surface conflicts between habits of a past heritage of domination and violence, and the social political and democratic conquests of modernity.

In Law, the concern with this dualism would not be absent. And the most comforting way of getting rid of this schizophrenic dilemma seems to be looking for an epistemological shelter which rationally surpasses those contradictions. The already mentioned Legal Positivism seems to be a glove to fit perfectly to promote the aimed security through a rhetoric based upon deductive logical arguments; as a matter of fact, it attempts to create an artificial equilibrium, a middle term between the

old-fashioned mechanic concept of authority and the modern flexible idea of democracy. Here, the meaning of social interactions consists on a combination of the acceptance of certain liberties, to the expense of controlling others considered "undesirable" and "dangerous"; but, on the end, the real aim seems to be to secure the social order and preserve the juridical system of the State and not to promote free and open interactions. The consequence is that within a same society one has two opposed types of behavior, corresponding to two different types of individuals.

Dewey's concept of interaction rejected individual behaviors, as something insulated but along and in connection with the behaviors of others. Dewey's concept of interaction also refused the idea that knowledge is the only privileged mode of accessing reality owned to its superiority in relation to practical activities. In this connection, social decisions are intellectual, participative and are not isolated. Besides, intellectual judgments are complex in the sense that they involve sentiments, affections, values and hopes.

Although the foundations of majority the European Court were supported by logic tenets, which provides a Positivist deductive way of reasoning, it goes apart from a real living logic of experience, and the analysis of its effects and consequences, as developed by the Philosophical Pragmatism of Peirce and Dewey and the legal realism of Holmes Jr.

The concepts of continuity and interaction in Dewey's philosophy help to better understand what should be the meaning of "living together in a democratic society". It is important to point out how the concept of continuity and democratic interaction proposed by John Dewey, comes closer to the grounds of the dissent opinion, then from the decision of the majority of the Court.

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